

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

January 11, 2006 Session

**FIDES NZIRUBUSA v. UNITED IMPORTS, INC., ET AL.**

**Appeal from the Circuit Court for Davidson County**  
**No. 03C-1769     Hamilton Gayden, Judge**

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**No. M2004-01884-COA-R3-CV - Filed on June 21, 2006**

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The buyer of a used car sued the dealer who sold it to her, alleging that after she paid off the car loan in full, the seller refused to release his lien and give her clear title to the vehicle unless she paid him additional money and persuaded her friends to buy cars from him. For his part, the dealer claimed that the buyer still owed on the car loan, and he denied the other allegations. He also argued that the buyer's claim under the Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-101 et seq., was time-barred because it was filed more than five years after she bought the car. After a full hearing on the merits, the trial court ruled for the buyer and held that the seller's refusal to release his lien amounted to a continuing violation of the Act which prevented the running of the statute of limitations. The court awarded the buyer treble damages and attorney fees, both of which are authorized by the Tennessee Consumer Protection Act. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court**  
**Affirmed**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Joel H. Moseley, Sr., Joel H. Moseley, Jr., Nashville, Tennessee, for the appellants, United Imports, Inc. and Farhad Soheilinia.

Charles K. Grant, Mark A. Baugh, Yanika C. Smith, Nashville, Tennessee, for the appellee, Fides Nzirubusa.

**OPINION**

In 1997, Fides Nzirubusa, a recent political refugee from Burundi, bought a used car from Gholam Ali Soheilinia d/b/a United Imports. Ms. Nzirubusa gave Mr. Soheilinia a down payment and financed the balance with him at an annual percentage rate of 28%, with future payments of \$300 per month. She completed the twenty-five payments called for in the contract ahead of schedule, but Mr. Soheilinia, himself a 1978 political refugee from Iran, refused to release his lien

unless she paid an additional \$500. Ms. Nzirubusa paid the additional money, but Mr. Soheilinia still refused to give her clear title, allegedly stating that he would only release the title if she purchased another vehicle from him or referred two other customers who would purchase vehicles from him.

In September 1999, Gholam Soheilinia was killed during a robbery of his business, and his son Farhad (Frank) took over United Imports. In January 2002, he told Ms. Nzirubusa that she owed an additional \$538 on the vehicle, and that if she paid, he would clear the title. She apparently paid, but he still refused to give her the title, allegedly claiming that she owed an additional \$3,000 in late fees. He also refused to give her a receipt for the \$538, but she was eventually able to persuade him to give her an acknowledgment of payment, which was scribbled on a scrap of paper.

In January 2003, Ms. Nzirubusa was involved in an accident in which the other driver was at fault. The \$1,712 check from the insurance company was made payable to both her and United Imports, the lien holder of record. Ms. Nzirubusa claimed that Mr. Soheilinia refused to endorse the check over to her and renewed the condition that she either purchase another vehicle from him or refer two other customers to purchase vehicles from him.

On March 6, 2003, Ms. Nzirubusa brought suit against Mr. Soheilinia and United Imports in the General Sessions Court of Davidson County. She claimed that the dealer's actions violated the Tennessee Consumer Protection Act and that they also constituted fraud, breach of contract, and breach of warranty of title. Mr. Soheilinia did not appear for the hearing, and the court granted Ms. Nzirubusa a default judgment for \$7,614, which included treble damages of \$3,114 for her \$1,038 overpayment, as well as \$4,500 in attorney fees. Mr. Soheilinia then filed an appeal in the Circuit Court.

Both parties filed motions for summary judgment, but the trial court took the motions under advisement and decided to conduct a hearing on the merits. Mr. Soheilinia testified that he did not release his lien because Ms. Nzirubusa still owed money on the car. Mr. Soheilinia denied that Ms. Nzirubusa had paid him the \$538 referenced above, that Ms. Nzirubusa had ever presented an insurance check to him for his signature, and that he had ever refused to release titles to anyone who had fully paid off his or her car loan.

The original bill of sale was entered into evidence, and the dealer insisted that it required the buyer to pay a total of \$7,518 in addition to her down payment of \$840, instead of a total of \$7,518 including the down payment. He relied on a portion of the contract that listed a balance due of \$7,518. However, under the heading BASIC INFORMATION ABOUT MY OBLIGATION (Federal Truth in Lending Disclosures), the contract stated that "[t]he total cost of my purchase on credit, including my down payment of \$ 840 is \$ 7,518." Other exhibits included receipts for the down payment and for monthly payments made to Gholam and Farhad Soheilinia, the aforementioned scribbled receipt for \$538, a copy of the vehicle's title, and a facsimile of the check from the insurance company.

Over objection, Ms. Nzirubusa was also allowed to introduce the testimony of two Rwandan citizens who claimed they had bought cars from Mr. Soheilinia and had been fraudulently treated. One claimed that the dealer had withheld a clear title from her after she paid off her car note in full. Another testified that the dealer had repossessed his car for one late payment when he was in the hospital, although only four payments were left on his obligation, and that no money was ever returned to him.

At the conclusion of proof, Mr. Soheilinia's attorney moved the court to dismiss Ms. Nzirubusa's claims on the ground that pursuant to all the pertinent statutes of limitations and statutes of repose the time for filing the lawsuit had passed. Ms. Nzirubusa's attorney argued that the complaint was timely filed, because the dealer's refusal to release his lien on Ms. Nzirubusa's car amounted to a continuing violation of the Consumer Protection Act and a continuing breach of contract.

The court then ruled that the statute of limitations did not bar the action because of the dealer's continuing breach of contract. The court also held that Ms. Nzirubusa was entitled to prevail on her claim under the Consumer Protection Act. The court found that the buyer had paid the full amount due on her installment contract and that the dealer's subsequent unfair and deceptive trade practices led her to overpay by \$1,038. Like the General Sessions Court, the Circuit Court entered a judgment under the Act's treble damages provisions for \$3,114 plus attorney fees. In addition, the court entered a mandatory injunction requiring delivery of clear title to Ms. Nzirubusa. Mr. Soheilinia filed a motion for new trial, which was denied. This appeal followed.

## **II. THE CONSUMER PROTECTION ACT**

The Tennessee Consumer Protection Act ("Act") declares that the Act "shall be liberally construed" to promote its purposes. Tenn. Code Ann. § 47-18-102. *See also Morris v. Mack's Used Cars*, 824 S.W.2d 538, 540 (Tenn. 1992). Those purposes include "protect[ing] consumers and legitimate business enterprises from those who engage in unfair and deceptive acts or practices in the conduct of any trade or commerce in part or wholly within this state." Tenn. Code Ann. § 47-18-102(2). To that end, the Act authorizes the court to award plaintiffs three times their actual damages if the unfair or deceptive act was willful or knowing, Tenn. Code Ann. § 47-18-109(a)(3), as well as attorney fees in appropriate cases, Tenn. Code Ann. § 47-18-109(e)(1).

Private actions for violations of the Act have a one-year statute of limitations. Tenn. Code Ann. § 47-18-110. In 2002 the relevant statute of repose was increased to five years, 2002 Tenn. Pub. Acts, ch. 617, § 1, and at the time Ms. Nzirubusa purchased her car, the statute of repose period was four years. Tenn. Code Ann. § 47-18-110 (1997).

Mr. Soheilinia's primary argument on appeal is that the trial court erred by not finding that Ms. Nzirubusa's suit was time-barred. This argument depends on the theory that the statutes began to run on September 20, 1997, the date that Ms. Nzirubusa purchased the car, and had therefore

expired before March 6, 2003, when she brought suit. The dealer's theory rests, in turn, on his interpretation of a definition found in the Act, Tenn. Code Ann. § 47-18-102, which reads,

(11) "Trade," "commerce," or "consumer transaction" means the advertising, offering for sale, lease or rental, or distribution of any goods, services, or property, tangible or intangible, real, personal, or mixed, and other articles, commodities, or things of value wherever situated.

The dealer argues that his "offering for sale" occurred in 1997 and, thus, that it would be contrary to the language and intention of the Consumer Protection Act to apply its provisions against him in response to a suit filed over five years later.

Ms. Nzirubusa argues that the trial court was correct in ruling that the dealer had engaged in a continuing violation of the Act that never abated because he never released his lien on the car. She also contends that each time that she asked for delivery of a clean title and was refused on spurious grounds, the dealer committed an additional deceptive act under the Tennessee Consumer Protection Act. According to her argument, such acts include the dealer's refusal to add his endorsement to Ms. Nzirubusa's insurance check, since the dealer's endorsement was only required because of his unreleased lien. That check was dated January 28, 2003, less than five weeks before the buyer filed suit.

The place to begin our analysis is the relevant statute of limitations which provides that any private action under the Act shall be commenced within one year "from a person's discovery of the unlawful act or practice." Tenn. Code Ann. § 47-18-110. Those acts or practices made unlawful by the Act are set out in Tenn. Code Ann. § 47-18-104 and are generally defined as unfair or deceptive acts or practices affecting the conduct of any trade or commerce. Tenn. Code Ann. § 47-18-104(a). We do not read the "affecting conduct of any trade or commerce" language as limited to one specific transaction. In other words, nothing in the definition relied upon by Mr. Soheilinia changes the requirement that the acts alleged deceptive or unfair affect trade or commerce generally. Certainly, the acts alleged herein and found to have been proved by the trial court were acts or practices that affect trade or commerce.

The statute of repose provides that no private action may be brought more than four years after the date of the "consumer transaction giving rise to the claim for relief." Tenn. Code Ann. § 47-18-110. "Consumer transaction" is defined in the provision relied on by the dealer and set out above. Tenn. Code Ann. § 47-18-103(11). Further, "consumer" is defined as a person who seeks or acquires any "goods, services, or property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value . . . ." Tenn. Code Ann. § 47-18-103(2).

The language of both provisions establishes that the unfair or deceptive act triggering the running of the statutory period is not limited in time to the sale or contract for sale and acts leading up to the sale. The definition of "trade, commerce, or consumer transaction" includes not only offering property for sale, but also "distribution of any goods, services, or property, tangible or

intangible, real, personal, or mixed, and other articles, commodities, or things of value wherever situated.” Tenn. Code Ann. § 47-18-103(11). Thus, it covers not only acts leading to the initial agreement to engage in a consumer transaction, but also the distribution of the property or other things of value that were the subject of that transaction. Similarly, the definition of consumer includes someone who seeks property or a thing of value.

A certificate of title, which provides clear evidence of the ownership of a motor vehicle, is a thing of value and may be considered an article or property. Part of the agreement to pay for an automobile is that ownership will transfer, not just possession. Consequently, the buyer continued to seek property or a thing of value. Additionally, the furnishing of a clean title is a distribution of property that arises from a commercial transaction and, consequently, unfair or deceptive acts or practices in regard to such a distribution can lead to civil liability under the Act.<sup>1</sup>

Similar reasoning was applied in *Sparks v. Allstate Insurance Co.*, 98 F. Supp. 2d 933 (W.D. Tenn. 2000), where the United States District Court was confronted with the question of whether Allstate Insurance’s refusal to pay a claim for a fire loss was actionable under the Tennessee Consumer Protection Act. The insurance company relied upon the same language as the dealer in this case to argue that the definition set out in Tenn. Code Ann. § 47-8-102(11) means that the Act could only apply to the initial sale of the policy. The court found, however, that the payment of claims was, by its nature, a distribution of property and that it therefore came within the ambit of the Act. *Sparks*, 98 F. Supp. 2d at 937.

We hold that Ms. Nzirubusa’s lawsuit was not barred by either the statute of limitations or the statute of repose. Her claim was based on Mr. Soheilinia’s failure or refusal to deliver to her unencumbered title to the car she bought. Clear title has value, and a lien impairs the value of the car to the owner. Each day that Mr. Soheilinia wrongfully deprived Ms. Nzirubusa of unencumbered title was a violation of the Act. Additionally, the dealer did not simply fail to release his lien; instead, each time the buyer asked for clean title, he created additional conditions for the buyer to meet, thus holding out an illusory hope that he would eventually comply with the contract of sale. His violation of the Act was ongoing.

The unfair and deceptive acts complained of in this case did not occur at the time the parties entered into their contract of sale, but rather afterwards. The narrow reading of the statute urged by the dealer would of necessity exclude from the protections of the Act similar situations where unfair or deceptive acts may occur at or near the end of the installment period. An interpretation leading to that result would contravene the legislature’s intent that the Act be liberally construed in furtherance of its purposes.

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<sup>1</sup> Additionally, it is a Class C misdemeanor for any person to fail or neglect to properly endorse or deliver any certificate of title to the person lawfully entitled to it. Tenn. Code Ann. § 55-3-127.

### III. BREACH OF CONTRACT

As we indicated above, the trial court also found that Mr. Soheilinia had committed a continuing breach of the contract with Ms. Nzirubusa. Since the trial court granted the plaintiff recovery under the Consumer Protection Act, we need not discuss this alternate cause of action in any great detail. However, Mr. Soheilinia argues on appeal that a statute of limitations would have also barred recovery on the breach of contract claim.

He relies upon Tenn. Code Ann. § 47-2-725(1), which states that “[a]n action for breach of any contract for sale must be commenced within four (4) years after the cause of action has accrued.” Assuming that the statute applies, for the same reasons set out above in our discussion of the Consumer Protection Act, we agree with the trial court that the dealer’s failure or refusal to transfer unencumbered title to the car was an ongoing breach of his contract to deliver ownership upon payment. Consequently, we conclude the breach of contract claims were timely filed.

Even if we were to apply the statute most favorably to Mr. Soheilinia, Ms. Nzirubusa’s cause of action accrued after she completed her final payment on the installment contract and Gholam Ali Soheilinia refused to give her a clean title to the automobile she had purchased from him. The record shows that Ms. Nzirubusa made her final payment on her installment obligation in April of 1999 and that she paid an additional \$500 to Mr. Soheilinia on May 31, 1999, but that he still refused to release his lien on the automobile. His breach was his failure to deliver title. It thus appears that the filing of Ms. Nzirubusa’s complaint on March 6, 2003 was timely under Tenn. Code Ann. § 47-2-725(1).

Mr. Soheilinia attempts to avoid this result by arguing that Ms. Nzirubusa’s cause of action accrued in September of 1997, when she first purchased the car. To bolster this argument, he cites part (2) of Tenn. Code Ann. § 47-2-725, which reads, “[a] cause of action accrues when the breach occurs, regardless of the aggrieved party’s lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.”

To make the above subsection fit his theory, Mr. Soheilinia reads “tender of delivery” as meaning the initial delivery of the car to Ms. Nzirubusa, which then forces him to recast her contract claim as one which only alleged a “breach of warranty of title.”<sup>2</sup> Such a breach occurs when a vendor sells property with faulty title, or where the property is subject to an encumbrance of which the buyer has no knowledge. Tenn. Code Ann. § 47-2-312. But Ms. Nzirubusa is not claiming that there was any encumbrance on the car at the time of sale, other than the vendor’s lien. The breach of contract she complains of occurred after she paid off her loan and Mr. Soheilinia refused to release his lien. As we noted, this occurred less than four years before she filed her Complaint.

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<sup>2</sup>The Complaint alleged that the defendants’ actions constituted both breach of contract and breach of warranty of title.

#### IV. WAIVER

Mr. Soheilinia's remaining argument on appeal is that the trial court committed reversible error by preventing his attorney from putting on proof. The transcript of the evidence shows that Ms. Nzirubusa's attorney called four witnesses, including Mr. Soheilinia., and that the witnesses were cross-examined by his attorney. At the conclusion of the plaintiff's proof, the dealer's attorney moved the court to dismiss the complaint pursuant to Rule 41 of the Tennessee Rules of Civil Procedure. The ground for his motion was that the complaint was time-barred by the statute of limitations. After hearing arguments on the question from both sides, the trial court dismissed the motion.

THE COURT: The court denies your motion to dismiss. The Court is of the opinion that this was a continuing breach. Do you want to argue it anymore?

MR. MOSELEY SR.: Are you saying continuing breach of the contract?

THE COURT: Right

MOSELEY: No.

The court then explained its reasoning, and in doing so it announced the disposition it intended to make on the case as a whole. The attorney did not offer to call any defense witnesses or otherwise indicate an objection to the court entering judgment. After a brief discussion as to a piece of evidence that had been misplaced, the court adjourned.

Rule 41.02(2) of the Tennessee Rules of Civil Procedure, which governs involuntary dismissals, provides:

After the plaintiff, in an action tried by the court without a jury, has completed the presentation of plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court shall reserve ruling until all parties alleging fault against any other party have presented their respective proof-in-chief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence; in the event judgment is rendered at the close of plaintiff's evidence, the court shall make findings of fact if requested in writing within three (3) days after the announcement of the court's decision.

The Advisory Commission Comments regarding that paragraph make it clear that these provisions were designed to eliminate the prior rule in chancery cases to the effect that a defendant could not move for dismissal at the end of the complainant's proof without resting his case and waiving his right to offer evidence.

Thus, under Rule 41.02, the auto dealer's attorney could have objected to the trial court's determination of the ultimate question as premature and requested the opportunity to put on his own proof. He did neither.

Rule 36(a) of the Tennessee Rules of Appellate Procedure authorizes our appellate courts to grant to parties whatever relief the law entitles them to under the facts of each case. The rule goes on to say that "[n]othing in this rule shall be construed as requiring relief to be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." Thus, even if the trial court erred by not explicitly inviting the attorney to present his proof, any such error could have been corrected by timely bringing it to the court's attention. Pursuant to Rule 36(a), we decline to grant any relief.

**V.**

The judgment of the trial court is affirmed. We remand this case to the Circuit Court of Davidson County. Costs of this appeal are assessed against the appellant, Farhad Soheilinia.

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PATRICIA J. COTTRELL, JUDGE